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Matthew F. Soares

NOTE

AGENCIES AND ALIENS: A MODIFIED APPROACH TO *CHEVRON* DEFERENCE IN IMMIGRATION CASES

Matthew F. Soares†

† B.S., Northeastern University, 2011; J.D. Candidate, Cornell Law School, 2014; Online Editor, *Cornell Law Review*, Volume 99. I would like to thank Professor Stephen W. Yale-Loehr for his guidance and advice while researching and drafting this piece. Thank you to the members of the *Cornell Law Review* for their hard work and excellent edits, especially Sonia Sujanani for her input and support throughout the process, and also to the journal's invaluable administrative assistant, Sue Pado. Lastly, I would like to thank my family for their constant support and encouragement.

Introduction

During the early months of 2012, the Supreme Court handed down two relatively obscure immigration law opinions: *Holder v. Martinez Gutierrez*[1] and *Kawashima v. Holder*.[2] While the highly publicized immigration decision in *Arizona v. United States*[3] largely overshadowed these decisions in the mainstream media, the two cases are highly illustrative of a dangerous trend in the field of immigration law. The Court ruled against two lawful permanent residents (green card holders) in *Holder v. Martinez Gutierrez* regarding their petitions for cancellation of removal.[4] Similarly in *Kawashima v. Holder*, the Court ruled against Mr. and Mrs. Kawashima, longtime permanent residents of the United States, and upheld their status of removability for filing a false tax return.[5] While at first glance these two cases appear to be relatively innocuous decisions, *Martinez Gutierrez* and *Kawashima* are actually the latest reminders of the near total lack of judicial review or oversight available in immigration law. Immigration law has a long history of judicial deference and lack of any meaningful judicial review.[6] In recent decades, the ruling in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, which significantly broadened the deference given to administrative agencies[7] and the Attorney General's broad discretion, have only exacerbated this problem.[8]

Judicial deference is particularly dangerous in a field such as immigration law, which holds great human consequences and affects some of the most disenfranchised and distant members of our legal system.[9] *Martinez Gutierrez* and *Kawashima* are merely the latest examples of the severe injustice that judicial deference to administrative agencies and a lack of any meaningful use of the immigration rule of lenity may cause in the immigration context. This Note reviews

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1 Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012).

2 Kawashima v. Holder, 132 S. Ct. 1166 (2012).

3 Arizona v. United States, 132 S. Ct. 2492 (2012).

4 *Martinez Gutierrez*, 132 S. Ct. at 2021.

5 *Kawashima*, 132 S. Ct. at 1176.

6 *See, e.g.*, United States *ex rel.* Knauff v. Shaughnessy, 338 U.S. 537, 544 (1950) ("Whatever the procedure authorized by Congress is, it is due process . . . ."); Fong Yue Ting v. United States, 149 U.S. 698, 713 (1893) (holding Congress has plenary power to remove people from the United States); Chae Chan Ping v. United States (*The Chinese Exclusion Case*), 130 U.S. 581, 585 (1889) (describing the power of the sovereign to regulate immigration and the limited nature of review in this setting).

7 467 U.S. 837, 842–43 (1984) (holding that when Congress's intent is not clear, courts defer to a reasonable agency interpretation).

8 *See* William C.B. Underwood, Note, *Unreviewable Discretionary Justice: The New Extreme Hardship in Cancellation of Deportation Cases*, 72 Ind. L.J. 885, 904–07 (1997) (discussing the broad discretion of administrative decision makers in cancellation-of-removal cases).

9 *See, e.g.*, Michael G. Heyman, *Judicial Review of Discretionary Immigration Decisionmaking*, 31 San Diego L. Rev. 861, 861–62 (1994) (arguing that deference eliminates the judicial check on arbitrary decision making).

Martinez Gutierrez and *Kawashima* to examine broader issues facing our immigration system today. I demonstrate the tension between the Attorney General (via the Board of Immigration Appeals (BIA)) and the federal courts of appeals, and the consequences of judicial deference to administrative agency decisions in the immigration context.

Part I of this Note introduces the background of the issue, including the statutory background behind immigration reform, removal from the country, and the cancellation-of-removal procedure, as well as the *Chevron* standard of deference to administrative decisions. Part II analyzes *Martinez Gutierrez*, *Kawashima*, and relatedly, the persistent conflict between the circuit courts and the BIA. Part III highlights the particular reasons why deference is so dangerous within the immigration context, recommends a policy of greater judicial oversight, and advances the theory that the purported goals and ideals of our immigration system are no longer in line with the functional application of these laws. Ultimately, my Note concludes that traditional *Chevron*-style deference is not appropriate in cases such as *Martinez Gutierrez* or *Kawashima* and recommends a standard that more fully addresses the particular needs of noncitizens, particularly long-time permanent residents, who are facing removal.

I
Background

A. Statutory Background

1. *Pre-1996 Law*

Until 1940, the Immigration Act of 1924 required deportation of a noncitizen illegally in the United States and made no exceptions under any circumstances.[10] The earliest example of a statutory provision providing for a cancellation or waiver of deportation came in the Alien Registration Act of 1940.[11] This Act allowed for suspension of deportation by the Attorney General if the noncitizen met certain requirements.[12] The Alien Registration Act of 1940 began a pattern of expanding avenues of relief from deportation for those noncitizens who would experience hardship that continued until 1990.[13] More recent legislation, however, has significantly curtailed these forms of discretionary relief for deportable noncitizens, while simultaneously

10 *See* Immigration Act of 1924, Pub. L. No. 68-139, § 14, 43 Stat. 153, 162 (1924).

11 *See* Alien Registration Act of 1940, Pub. L. No. 76-670, § 20, 54 Stat. 670, 672–73 (1940).

12 *See id.*

13 *See* Brian N. Hayes, *Matter of A-A-: The Board of Immigration Appeals' Statutory Misinterpretation Denies Discretionary Relief to Aggravated Felons*, 34 Santa Clara L. Rev. 247, 274 (1993) (noting that "the Alien Registration Act of 1940 did not immediately exact punishments upon aliens") (citation omitted).

increasing the number of noncitizens who qualify as deportable.[14] Taken together, the expanding number of noncitizens who qualify for deportation and the shrinking avenues of discretionary relief for these noncitizens is a disturbing trend in our immigration system.

In 1952, Congress enacted the Immigration and Nationality Act (INA),[15] which remained largely unchanged until 1990. Before the sweeping changes made by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), section 212(c) and section 244(a) of the INA were the primary forms of relief from deportation.[16] Section 212(c) (waiver of inadmissibility or deportability) was a broad provision that provided lawful permanent residents potential relief from deportation.[17] Recognizing the extreme hardship that deportation had on long time permanent residents, section 212(c) allowed lawful permanent residents (LPRs) a discretionary waiver of most grounds of exclusion.[18] To qualify, a returning lawful permanent resident had to have been lawfully admitted as a permanent resident and must continue to hold that status, must have had a domicile of seven consecutive years in the United States, must have departed the United States voluntarily, and may not be deportable for a number of specified criminal categories.[19] This provision was eventually interpreted to provide broad protection for both lawful permanent residents returning from trips abroad as well as noncitizens currently residing within the United States.[20] Section 244(a) (suspension of deportation) was a similar provision that applied to noncitizens who had not previously been granted lawful permanent resident status.[21] Section 244(a), which a noncitizen could only raise in deportation proceedings, allowed the Attorney General to suspend deportation for certain noncitizens who had resided in the United States for a significant period of time and could demonstrate that serious hardship would result from their deportation.[22]

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14 *See* 1 CHARLES GORDON ET AL., IMMIGRATION LAW AND PROCEDURE § 74.01[1] (rev. ed. 2013) [hereinafter GORDON].

15 Immigration and Nationality Act (INA) of 1952, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended at 8 U.S.C. §§ 1101–1537).

16 INA § 212(c), 8 U.S.C. § 1182(c) (1994) (repealed 1996); INA § 244(c), 8 U.S.C. § 1254(c) (1994) (repealed 1996); Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, div. C, 110 Stat. 3009-546 (1996) (codified as amended in scattered sections of the U.S. Code). For background, see GORDON, *supra* note 14, § 64.04[1].

17 *See* GORDON, *supra* note 14, § 74.04[1][a].

18 *See id.*

19 *See* GORDON, *supra* note 14, § 74.04[2][a].

20 *See* GORDON, *supra* note 14, § 74.04[1][a].

21 *See* GORDON, *supra* note 14, § 74.07[3][a]–[c].

22 *See* GORDON, *supra* note 14, § 74.07[2][a].

2. *1996 Changes and the IIRIRA*

Congress enacted the IIRIRA in 1996 largely to restrict illegal immigration and attack criminal aliens by expanding the categories of crimes that make a noncitizen eligible for deportation.[23] The IIRIRA introduced sweeping changes to most aspects of immigration law. Significantly, the IIRIRA erased the earlier distinction between "exclusion" (refusal to admit someone at the border) and "deportation" (removal of someone already within the United States), consolidating both procedures under the new title of "removal."[24] Similarly, a new provision for "cancellation of removal" replaced sections 212(c) and 244(a).[25] This new provision can be found in section 240A of the INA.[26] While ostensibly created as a device to allow noncitizens to remain in this country, cancellation of removal carries much higher barriers to eligibility than its predecessors.[27] The current provision enacted by the IIRIRA provides three criteria for cancellation of removal.[28]

One of the critical restrictions placed on this discretionary relief by the IIRIRA relates to the expansion of the definition of aggravated felonies.[29] A conviction for an aggravated felony is one of the primary impediments to receiving relief from deportation through cancellation of removal.[30] While a comprehensive look at the full topic of criminal grounds for deportability is outside the scope of this Note, it is important to mention that the IIRIRA expanded the definition of aggravated felonies to a much broader range of crimes to include over fifty different types, ranging from theft to murder and including tightened restrictions on drug and fraud offenses, adding to the list of crimes.[31] This expansion has placed significant limits on the availability of cancellation of removal, one of the few available grounds for relief from removal from the United States.[32]

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23 Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, § 321, 110 Stat. 3009-546, 627–28 (1996); *see also* Underwood, *supra* note 8, at 892–95 (explaining that Congress further "placed additional procedural restrictions limiting an alien's ability to reopen and reconsider deportation proceedings").

24 *See* GORDON, *supra* note 14, § 64.01[1].

25 *See* GORDON, *supra* note 14, § 74.04[1][b] (IIRIRA "repealed INA § 212(c) in its entirety and replaced it with an analogous form of relief called cancellation of removal.").

26 8 U.S.C. § 1229b (2012).

27 *See* GORDON, *supra* note 14, § 64.04[1] ("[R]emoval is always a heavy burden . . . .").

28 8 U.S.C. § 1229b(a).

29 GORDON, *supra* note 14, § 74.04[1][b].

30 *See id.*

31 *See* GORDON, *supra* note 14, § 71.05[2].

32 *See id. See generally* Underwood, *supra* note 8.

B. The *Chevron* Standard

1. *The* Chevron *Case*

In addition to the statutory provisions for cancellation of removal, one of the most significant issues in *Holder v. Martinez Gutierrez*[33] was regarding the deference standard expressed by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[34] Almost thirty years after the Supreme Court decided *Chevron*, the case has transformed the landscape of administrative law and created a myriad of scholarship.[35] It has become one of the most famous cases in administrative law. Two commentators have even called it "the most cited case in modern public law."[36] To understand *Martinez Gutierrez*, it is imperative to understand *Chevron*.

Chevron involved a dispute over who should interpret Congress's 1970 Clean Air Act Amendments—the circuit courts or the Environmental Protection Agency (EPA). [37] The Supreme Court articulated a two-part test for determining when courts should defer to the interpretations of administrative agencies.[38] In step one, a reviewing court should ask "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."[39] If a reviewing court finds congressional intent ambiguous, the court must continue on to step two. In step two, "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[40] The Court made clear in *Chevron* that "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[41]

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33 132 S. Ct. 2011 (2012).

34 467 U.S. 837 (1984).

35 *See, e.g.*, Evan J. Criddle, Chevron*'s Consensus*, 88 B.U. L. REV. 1271, 1283–91 (2008) (revisiting the theories *Chevron* rests upon); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1242 (2011) (arguing *Chevron* should not apply when the agency interpretations are based on informal procedures); Thomas W. Merrill & Kristin E. Hickman, Chevron*'s Domain*, 89 GEO. L.J. 833, 838–51 (2001) (examining the scope of *Chevron*'s mandatory deference).

36 Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of* Chevron, 73 U. CHI. L. REV. 823, 823 (2006).

37 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 845–46 (1984).

38 *See id.* at 842–43.

39 *Id.*

40 *Id.* at 843.

41 *Id.* at 844. In *Chevron*, the Court used the words "permissible" and "reasonable" interchangeably to describe an agency's interpretation of an ambiguous statute. *See id.* at 843–44. The Court has continued to use these two terms interchangeably in their cases discussing the *Chevron* standard. *See, e.g.*, City of Arlington v. FCC, 133 S. Ct. 1863, 1868

Chevron essentially expanded the use of administrative and agency interpretations from circumstances where Congress specifically granted this interpretation power to any instance where Congress left an ambiguous intent.[42] Many argue that *Chevron* has numerous benefits, including promotion of uniformity and efficiency, as well as preservation of separation of powers.[43] Decades later, however, academics are still debating *Chevron*'s foundation. In regard to the principles supporting *Chevron*, scholars still debate "whether *Chevron* deference rests upon a theory of congressional delegation, administrative expertise, agency deliberative rationality, the executive branch's political responsiveness and accountability, concerns for national regulatory uniformity, or inherent executive power."[44]

2. Chevron*'s Legacy in Immigration Cases*

Of the thousands of cases that have followed from the monumental *Chevron* decision, two important cases bear mentioning when discussing *Chevron* in the immigration law context. First, in *INS v. Cardoza-Fonseca*, the Supreme Court overturned the BIA's statutory interpretation of the rules for asylum and withholding of deportation.[45] Section 243(h) of the INA covered withholding of deportation and required that it be "more likely than not that the alien would be subject to persecution."[46] Section 208(a), which covers asylum, allows a discretionary grant of asylum if a refugee has "a well-founded fear" of persecution.[47] While the BIA interpreted the "well-founded fear" language to mean the fear had to be "more likely than not" and claimed that the two standards were the same, the Supreme Court examined the vastly different language of the two sections and concluded that Congress had intended for different standards to apply.[48]

(2013) ("Statutory ambiguities will be resolved, within the bounds of reasonable interpretation, not by the courts but by the administering agency."); *id.* at 1880 ("We give binding deference to permissible agency interpretations of statutory ambiguities . . . ."). Consequently, these two terms will be utilized interchangeably throughout this Note.

42 *See* Merrill & Hickman, *supra* note 35, at 833.

43 *See generally* David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After* Chevron, 59 ADMIN. L. REV. 479, 494–501 (2007) (explaining *Chevron*'s benefits).

44 Criddle, *supra* note 35, at 1273.

45 480 U.S. 421 (1987).

46 *Id.* at 423 (quoting INS v. Stevic, 467 U.S. 407, 429–30 (1984)) (internal quotation marks omitted). In 1996 as part of the IIRIRA, Congress changed INA section 243(h) to section 241(b)(3), changing "[w]ithholding of deportation" to "[r]estriction on removal." 8 U.S.C. § 1253(h) (1994), *amended by* 8 U.S.C. § 1231(b)(3) (2012). But the "more likely than not" standard remains the same.

47 *Cardoza-Fonseca*, 480 U.S. at 425, 430; *see* INA § 208(a), 8 U.S.C. § 1158(a) (1952), *amended by* Refugee Act of 1980, 8 U.S.C. § 1101(a)(42)(A) (2012) (applying the definition of "refugee" to the "well-founded fear" standard).

48 *Cardoza-Fonseca* at 446–49; *see* INA § 243(h), 8 U.S.C. § 1253(h) (applying to withholding cases and interpreted to have a "clear probability" standard, which *Cardoza-Fonseca*

Cardoza-Fonseca importantly demonstrates two key propositions related to applying *Chevron* in the immigration context. First, while immigration law typically has been subject to minimal judicial review or oversight, *Cardoza-Fonseca* stands for the proposition that some judicial review is proper in immigration cases, despite the plenary power and *Chevron*. *Chevron* is not a license merely to rubber stamp administrative action. [49] Second, *Cardoza-Fonseca* aptly illustrates an appropriate use of step one of the two-step *Chevron* analysis.[50] *Chevron* only requires a two-step analysis if the intent of Congress is ambiguous. When congressional intent is clear and the statute is unambiguous, an agency (or a court) may not create its own rule or interpretation.

Next, *INS v. Aguirre-Aguirre*[51] stands for a contradictory proposition; it reminds us that while *Chevron* allows judicial review, circuit courts must also comply with *Chevron* step two by paying due deference to reasonable agency decisions when congressional intent is unclear. In this case, the BIA held a Guatemalan native ineligible for withholding of deportation based on its interpretation of "a serious nonpolitical crime."[52] After the Ninth Circuit reversed, the Supreme Court reversed again, reinstating the original BIA decision. Having found the language ambiguous, the Court followed *Chevron* step two and ordered the circuit court to defer to the reasonable interpretation of the BIA.[53] In doing so, the Court made clear that *Chevron* does apply in immigration cases to limit judicial review. Here, the Supreme Court agreed that the statute was ambiguous and therefore continued the *Chevron* analysis to step two, ruling on the reasonableness of the agency's interpretation.

Taken together, *Cardoza-Fonseca* and *Aguirre-Aguirre* illustrate that immigration law is not insulated from *Chevron*. This does not mean,

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understood as "more likely than not"); INA § 208(a), 8 U.S.C. § 1158(a) (applying to asylum cases and establishing a "well-founded fear" standard, which *Cardoza-Fonseca* held was not governed by the section 243(h) standard).

49 The Court in *Cardoza-Fonseca* gave some explanation of the role of federal courts in reviewing the statutory construction of agencies such as the INS. *See Cardoza-Fonseca*, 480 U.S. at 445 ("The INS argues that the BIA's [statutory] construction . . . is entitled to substantial deference, even if we conclude that the Court of Appeals' reading of the statutes is more in keeping with Congress'[s] intent. This argument is unpersuasive." (citation omitted)); *id.* at 446 n.30 ("An additional reason for rejecting the INS's request for heightened deference . . . is the inconsistency of the positions the BIA has taken through the years."); *id.* at 448 ("[O]ur task today . . . is well within the province of the Judiciary. . . . [W]e merely hold that the Immigration Judge and the BIA were incorrect in holding that the two standards are identical.").

50 To see how the Court analyzed *Chevron* and, given statutory ambiguity, proceeded to review the BIA's decision, see *id.* at 445 n.29, 446–48.

51 526 U.S. 415 (1999).

52 *Id.* at 418 (citing the statutory language previously found in INA § 243(h)(2), 8 U.S.C. § 1253(h)(2)(c), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 § 307, Pub. L. No. 104-208, 110 Stat. 3009 (1996).

53 *Id.* at 423–25.

however, that circuit courts lack teeth to exact judicial review in appropriate cases under *Chevron*'s system of review.

C. The Immigration Rule of Lenity

Lastly, before proceeding to *Martinez Gutierrez* and *Kawashima*, it is critical to look at an important, competing issue in the immigration context. Constantly in the background, butting heads with *Chevron*'s presumption of deference, is the immigration rule of lenity. The rule of lenity was originally a common law doctrine in the criminal law context that required courts to construe ambiguous laws in favor of the defendant due to the overwhelming constitutional concerns associated with punishment and depriving an individual of life, liberty, or property.[54] The immigration rule of lenity follows the same principle.[55] As early as 1948, the Supreme Court acknowledged deportation's harsh consequences when it stated that deportation is a "drastic measure and at times the equivalent of banishment or exile."[56] Due to these strong concerns, the Supreme Court announced the canon that ambiguities affecting deportation should be read in favor of the noncitizen. [57] In doing so, the Court mirrored the centuries-old doctrine of criminal lenity, which requires narrow statutory construction in favor of a defendant.[58]

These related rules of lenity are well-established guidelines of statutory construction that the Court has used for decades when dealing with ambiguity.[59] The Court reaffirmed this doctrine in *Cardoza-Fonseca*[60] and *INS v. St. Cyr.*[61] Despite the frequency with which the Court cites this rule in immigration cases, it is no more than a judicially created rule of construction. Courts have often abandoned this judicially constructed common law or failed to square it with the more recent *Chevron* standard when *Chevron*, an official Supreme Court doctrine of deference, appears to conflict with the rule of lenity in immigration cases.[62] On the one hand, courts should have to defer to interpretations advanced by the immigration agencies. In recent decades, however, doing so often directly conflicts with the principle of

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54 *See* Brian G. Slocum, *The Immigration Rule of Lenity and* Chevron *Deference*, 17 GEO. IMMIGR. L.J. 515, 520 & nn.17–21 (2003) (examining the history of the rule of lenity in the criminal context and then the eventual use of the rule in the immigration context).

55 *See id.*

56 Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948); *see also* Ng Fung Ho v. White, 259 U.S. 276, 284 (1922) (stating that deportation may deprive an individual "of all that makes life worth living").

57 *See Fong Haw Tan*, 333 U.S. at 10.

58 *See* Slocum, *supra* note 54, at 516–20.

59 *See id.* at 519–22.

60 480 U.S. 421, 449 (1987).

61 533 U.S. 289, 320 (2001).

62 *See* Rubenstein, *supra* note 43, at 501–04.

lenity—that ambiguous statutes be construed favorably for the noncitizen in deportation cases to ameliorate the harmful effects deportation.[63] This unresolved conflict was precisely the issue in *Martinez Gutierrez*. The difficulty in analyzing this issue lies in the dearth of cases addressing both the principle of lenity and *Chevron* together. Courts instead seem to cite one or the other, and the Supreme Court often defers to *Chevron* (as in *Martinez Gutierrez*) or dismisses lenity (as in *Kawashima)* summarily, perhaps assuming it is established stare decisis that *Chevron* holds greater weight than lenity. Despite most courts' unwillingness to square the two concepts, I believe comparing the Court's two recent decisions in *Martinez Gutierrez* and *Kawashima* can be helpful and illustrative in finding a reasonable way to apply both standards to immigration and removal cases.

II
ANALYSIS

A. *Holder v. Martinez Gutierrez*

1. *Factual Background*

In the first of two consolidated cases, Carlos Martinez Gutierrez's family brought him to the United States illegally as a five-year-old minor.[64] Two years later, his father was legally admitted to the country and became a lawful permanent resident.[65] Martinez Gutierrez lived in the United States continuously after 1989 but did not get his own green card and legal status until 2003.[66] After an arrest in 2005, he sought cancellation of removal based on his long residency in the United States and his father's fourteen years of lawful permanent resident status. Martinez Gutierrez could not himself fulfill either of the requirements for cancellation of removal—he had neither five years of permanent resident status nor seven years of residency.[67] Given that he was a minor when he was brought to the United States, however, he asked that the immigration judge impute his parent's time while he was a minor to satisfy the requirements for cancellation of removal.[68]

Similarly, in the second case, Damien Sawyers was lawfully admitted on a green card in October 1995 when he was still a

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63 *Cf. id.* at 504–08, 511–17 (arguing that "lenity should be applied only . . . after the court determines both that [a] statute is ambiguous under [*Chevron*'s] step one and that the agency's interpretation is unreasonable under step two").

64 Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2016 (2012).

65 *Id.*

66 *Id.*

67 *Id.*

68 *See id.*

fifteen-year-old minor.[69] His mother had been legally residing in the United States for six years before this date.[70] Sawyers was convicted of a drug offense in August 2002 and sought cancellation of removal.[71] While Martinez Gutierrez did not satisfy the requirement of either seven years of legal residence or five years of lawful permanent resident status, Sawyers was a much closer case for satisfying the statutory requirements for cancellation of removal. Sawyers had already met the five years of lawful permanent resident status and was only two months shy of having seven years of continuous legal residence.[72] He asked that the immigration judge impute his mother's additional six years of legal residence to him to satisfy the cancellation-of-removal requirements. In both cases the immigration judges denied relief.[73]

2. *Procedural Background*

In both cases, the BIA, the administrative board that hears immigration appeals, determined that Martinez Gutierrez and Sawyers could not satisfy the requirements for cancellation of removal themselves. In both cases, the BIA refused to allow imputation.[74] On appeal, the Ninth Circuit overruled the BIA in both cases, relying on a number of earlier Ninth Circuit cases to rule that the BIA's interpretation was unreasonable and indicating that a parent's residency time should be imputed to minor children.[75] The Supreme Court consolidated the two cases and granted certiorari.

3. *The Supreme Court's Decision in* Martinez Gutierrez

The current cancellation-of-removal provision reads:

> (a) Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.[76]

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69 *Id.* at 2017.

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.* at 2016–17.

74 *Id.*

75 *Id.* at 2016; Gutierrez v. Holder, No. 08-70436, 411 F. App'x 121, 122 (9th Cir. 2011) (mem.), *rev'd sub nom* Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012); Sawyers v. Holder, No. 08-70181, 399 F. App'x 313, 314 (9th Cir. 2010) (mem.), *rev'd sub nom* Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012).

76 INA § 240A, 8 U.S.C. § 1229b(a) (2012).

The BIA has consistently interpreted this language to require each noncitizen seeking cancellation of removal to meet these three criteria individually.[77] The BIA argued this was clearly a permissible interpretation of the statute, as it does not mention imputation anywhere.[78] The Supreme Court, citing *Chevron*, deferred to the BIA and stated that the BIA's interpretation "prevails if it is a reasonable construction of the statute, whether or not it is the only possible interpretation."[79]

In response to these contentions, respondents Martinez Gutierrez and Sawyers advanced a number of historical and statutory construction arguments.[80] The respondents drew numerous parallels between the current INA section 240A and its earlier iteration in INA section 212(c) in an attempt to overcome the presumption of ambiguity of congressional intent in the statute.[81] The previous statute allowed cancellation of deportation upon a finding of "lawful unrelinquished domicile of seven consecutive years."[82] Respondents argued that because a child's domicile is the same as his or her parents and because this often led the BIA to impute a parent's domicile to his or her child under the previous statute, Congress had intended imputation to apply in these cases despite the legislative change.[83]

The Court rejected the respondents' arguments regarding section 212(c). On the contrary, since Congress removed the key word "domicile" when enacting section 240(a), the Court found that the argument actually cut against respondents and failed to show any such congressional ratification of the idea of imputation.[84] The Court was similarly skeptical about respondents' argument that the stated purposes of the immigration system—family unity and relief for noncitizens with strong U.S. ties—required imputation here.[85] The Court acknowledged that these are important goals but held that they are not the only goals of the immigration system and that it cannot be assumed Congress would pursue goals such as family ties above all else.[86] In rejecting the decisions of the Ninth Circuit, the Supreme Court demonstrated the enormous level of judicial deference common in immigration law and illustrated the anemic power of current

77 *Martinez Gutierrez*, 132 S. Ct. at 2017.
78 *Id.*
79 *Id.*
80 *See id.* at 2017–20.
81 *See id.* at 2018–20.
82 INA § 212(c), 8 U.S.C. § 1182(c) (1994), *amended by* Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, § 304(b), Pub. L. No. 104-208, 110 Stat. 3009 (1996).
83 *See Martinez Gutierrez*, 132 S. Ct. at 2018.
84 *See id.* at 2018–19.
85 *See id.* at 2019.
86 *See id.*

judicial review to correct potential injustices in the immigration system.

Ultimately, the Supreme Court's decision in *Martinez Gutierrez* does not appear novel. Rather, the Court cited *Chevron* as if it were a completely decided principle and applied stare decisis rather summarily.[87] It is exactly this summary treatment, however, that makes this case a perfect example to highlight a number of issues in the immigration law context that require further inquiry and more robust judicial scrutiny.

B. Conflict Between the Circuit Courts and the BIA

The two Ninth Circuit cases here illustrate a common conflict between the circuit courts of appeals and the BIA. The Supreme Court noted in *Martinez Gutierrez* that under the older INA section 212(c), "the Second, Third, and Ninth Circuits (the only appellate courts to consider the question) concluded that, in determining eligibility for relief under [section] 212(c), the Board should impute a parent's years of domicile to his or her child."[88] Additionally, in both *Sawyers v. Holder* and *Gutierrez v. Holder*, the Ninth Circuit found the BIA's reading of the statutory provision to be impermissible and instead held that imputation of a parent's time in the United States was the accepted standard even under the new INA section 240A.[89] This creates an interesting tension where the BIA is required to follow an overruling decision by a circuit court within that particular circuit but can and often will continue to follow its own interpretation in the rest of the circuits.[90] This nonacquiescence is permissible because the BIA is a part of the Department of Justice's (DOJ's) Executive Office of Immigration Review (EOIR), and as an independent agency, the BIA is free to follow its own rulings except in jurisdictions where a federal appeals court has overruled them.[91] This may lead to different

87 *See id.* at 2021 ("[T]he decision reads like a multitude of agency interpretations . . . to which we and other courts have routinely deferred. We see no reason not to do so here.").

88 *Id.* at 2018 (citations omitted).

89 *See* Gutierrez v. Holder, No. 08-70436, 411 F. App'x 121, 122 (9th Cir. 2011) (mem.), *rev'd sub nom* Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012); Sawyers v. Holder, No. 08-70181, 399 F. App'x 313, 314 (9th Cir. 2010) (mem.), *rev'd sub nom* Holder v. Martinez Gutierrez, 132 S. Ct. 2011 (2012).

90 *See, e.g.*, Rodriguez, 25 I. & N. Dec. 784, 786–87, 789 (B.I.A. 2012) (applying a different (required) standard in removal proceedings arising within the Fourth, Fifth, and Eleventh Circuits than the general BIA standard applied elsewhere); Salazar-Regino, 23 I. & N. Dec. 223, 235 (B.I.A. 2002) (recognizing the Ninth Circuit's contrary ruling but failing to apply it outside the Ninth Circuit and instead holding that outside the Ninth Circuit, a first-time drug possession offense that was expunged is still a conviction for immigration purposes).

91 *See, e.g.*, Salazar-Regino, 23 I. & N. Dec. 223 at 234–35 (finding that a court of appeals decision in a different circuit is not binding); Singh, 25 I. & N. Dec. 670, 672–73,

standards applying in different states and regions of the country, which can create confusion and undermine clarity in the administration of immigration law.

C. *Kawashima v. Holder*

1. *Factual Background*

Akio and Fusako Kawashima became lawful permanent residents in June 1984.[92] Mr. and Mrs. Kawashima, natives of Japan, had been lawfully living in the United States for thirteen years when, in 1997, Mr. Kawashima pled guilty and was convicted of preparing a false corporate tax return.[93] Mrs. Kawashima was convicted of helping him prepare this return.[94] After the Kawashimas served their criminal sentences, the INS brought a claim charging that they were deportable as noncitizens who had been convicted of an aggravated felony.[95] Despite the couple's long and peaceful time spent living in the United States as permanent residents, the INS brought deportation proceedings against them under INA section 237(a)(2)(A)(iii), which states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable."[96]

2. *Procedural Background*

As mentioned above, the Immigration and Nationality Act lists over fifty categories of crimes as "aggravated felonies" for immigration and deportation purposes.[97] Here, the INS asserted that the Kawashimas qualified as aggravated felons based on 8 U.S.C. § 1101(a)(43)(M), which lists as an aggravated felony any crime that either:

> (i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or
> (ii) is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000.[98]

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679 (B.I.A. 2012) (holding that a court of appeals decision that reversed a BIA precedent decision is not binding in a case in a different circuit). *See generally* 8 C.F.R. § 1003.1 (2013) (defining the BIA's jurisdiction and powers); Holper, *supra* note 35, at 1244–46 (illustrating the relationships between the BIA, as an executive branch agency, and other courts in handling removal proceedings); Rubenstein, *supra* note 43, at 480 & n.4 (explaining that the Attorney General has authority to issue controlling rulings in connection with the INA and has delegated interpretational authority to the BIA).

92 Kawashima v. Holder, 132 S. Ct. 1166, 1170 (2012).

93 *Id.*

94 *Id.*

95 *Id.* at 1170–71.

96 8 U.S.C. § 1227(a)(2)(A)(iii) (2012); *Kawashima*, 132 S. Ct. at 1171.

97 *See* Gordon, *supra* note 14, § 71.05[2][b].

98 8. U.S.C. § 1101(a)(43)(M) (2012); *Kawashima*, 132 S. Ct. at 1171.

During the Kawashimas' deportation hearing before an immigration judge (IJ), they asserted that their crimes should not qualify as aggravated felonies under these provisions.[99] The IJ ruled against the Kawashimas and found that they were removable from the United States as noncitizens convicted of an aggravated felony under § 1101(a)(43)(M)(i).[100] The Kawashimas appealed the decision to the BIA, which affirmed the IJ's decision.[101] The Ninth Circuit affirmed the BIA's decision on appeal, and the Supreme Court granted certiorari to rule on whether their crimes qualified as aggravated felonies under the immigration laws.[102]

3. *The Majority's Decision in* Kawashima v. Holder

The Kawashimas advanced a number of arguments for why their convictions did not qualify as aggravated felonies under the immigration statutes and particularly under § 1101(a)(43)(M)(i). First, they argued their crimes did not involve "fraud or deceit" as required by § 1101(a)(43)(M)(i).[103] Next, they claimed that tax crimes are covered in § 1101(a)(43)(M)(ii) and should not be included in clause (i) of subparagraph M at all.[104] Lastly, the Kawashimas claimed that subparagraph (M)(i) was at the very least ambiguous and therefore, under the immigration rule of lenity, should be construed in their favor due to the harsh nature of removal.[105] Justice Clarence Thomas's majority opinion addressed and rejected each one of these arguments in turn.[106]

First, Mr. Kawashima was convicted as a person who "[w]illfully makes and subscribes any return, statement, or other document . . . which he does not believe to be true and correct as to every material matter,"[107] and he argued that this crime does not contain "fraud" or "deceit" as a formal element.[108] The Court, utilizing a categorical approach to the interpretation of the crime, determined that the words "fraud" and "deceit" did not need to appear formally in the definition, as subparagraph (M)(i) included crimes where fraud was "involved," and that knowingly submitting an untrue tax return inherently involved deceit.[109]

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99 *Kawashima*, 132 S. Ct. at 1171.
100 *Id.*
101 *See id.*
102 *See id.*
103 *Id.* at 1171.
104 *Id.* at 1173.
105 *See id.* at 1175–76.
106 *See id.* at 1172.
107 26 U.S.C. § 7206(1) (2012); *Kawashima*, 132 S. Ct. at 1172 (internal quotation marks omitted).
108 *Kawashima*, 132 S. Ct. at 1172.
109 *See id.*

Next, the Court addressed the far more compelling argument regarding statutory interpretation and the fact that in light of subparagraph (M)(ii)'s specific mention of tax-related crimes, subparagraph (M)(i) should not include such crimes.[110] The Kawashimas asserted that, when read together, it was clear Congress intended subparagraph (M)(i) to cover general non-tax crimes where the loss was to personal victims, while (M)(ii) covered the separate category of tax crimes causing a loss to the government.[111] In support of this reading the Kawashimas mentioned the difference in language between (M)(i)'s "loss to the victim" and (M)(ii)'s "revenue loss to the Government," as well as the familiar presumption of statutory interpretation that one is to interpret statutes to avoid superfluities.[112] The Kawashimas contended that if (M)(i) covered all tax crimes as the BIA and Ninth Circuit had supposed, it would render (M)(ii) superfluous and redundant.[113] The Court rejected these arguments, claiming that the difference in scope of each provision explained the difference of language, and that rather than a superfluity, Congress intentionally added subparagraph (M)(ii) "to remove any doubt that tax evasion qualifies as an aggravated felony."[114]

Finally, the Court's treatment of the Kawashimas' final argument, an appeal to the immigration rule of lenity, is most striking and important. The Court summarily dismissed the use of the immigration rule of lenity with little justification. The principle of lenity is treated in the following two sentences of the opinion: "It is true that we have, in the past, construed ambiguities in deportation statutes in the alien's favor. We think the application of the present statute clear enough that resort to the rule of lenity is not warranted."[115]

4. *Justice Ginsburg's Dissent in* Kawashima v. Holder

To truly illustrate the summary treatment of the Kawashimas' case and how this decision highlights the disturbing trend of less judicial scrutiny and less lenity in immigration cases involving deportation, we must look briefly at Justice Ruth Bader Ginsburg's dissent, in which Justices Stephen Breyer and Elena Kagan joined, arguing for lenity given the ambiguities in the statutory interpretation. Justice Ginsburg addressed two key issues with the majority's reading of the statute. First, she reiterated that the reading made clause (M)(ii) superfluous in all but the most rare circumstances. [116] Additionally, she

110 *See id.* at 1173–75.
111 *See id.* at 1173.
112 *Id.* at 1173–74.
113 *Id.*
114 *Id.* at 1174.
115 *Id.* at 1176 (citation omitted).
116 *See id.* at 1178 (Ginsburg, J., dissenting).

raised the issue that such a reading pulls an enormous body of tax crimes, including some minor state misdemeanor tax crimes, into the federal category of "aggravated felonies" that can make a permanent resident removable from the United States. [117]

First, Justice Ginsburg's dissent concisely laid out the real issues at play in this case. She mentioned that if the Kawashimas' proposed reading of the statutory language was "plausible in roughly equal measure" to the Court's, "then [Supreme Court] precedent directs us to construe the statute in the Kawashimas' favor."[118] She continued on to cite the line of case precedent that establishes the "familiar canon" that statutory interpretation should avoid superfluities.[119] She then cited case precedent that states that "a conviction for tax evasion . . . 'conclusively establishes fraud.'"[120] From these premises, Justice Ginsburg concluded that if, as the majority suggested, (M)(i) had been intended to cover tax offenses, those offenses would necessarily involve fraud and there would have been no need to include (M)(ii) "to remove any doubt."[121] Thus, the Court's reading made (M)(ii) superfluous, and Justice Ginsburg claimed it was not enough for the court to hypothesize as to an instance when (M)(i) may not capture a case of tax evasion. She mentioned that "[t]he Government conceded that, to its knowledge, there have been no actual instances of indictments for tax evasion unaccompanied by . . . fraud or deceit."[122] She continued, claiming the canon against superfluity is not rigid and literal and that the Court had previously declined to interpret legislation to make a provision superfluous "in all but the most unusual circumstances."[123]

Finally, the dissent further undermined the credibility of the majority's reading of the statute by illustrating just how many tax offenses it would sweep up into the aggravated felony category, including misdemeanors such as providing a false W-2 form to an employee or committing various state misdemeanor charges.[124] While not discussed explicitly by the dissent, presuming such a vast congressional intent in writing the statute seems inherently unlikely, not merely because it would create aggravated felonies out of misdemeanor charges but also because of the extremely harsh consequences for permanent residents who are removed based on an aggravated felony charge. Among all of

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117 *Id.* at 1179–80.

118 *Id.* at 1177.

119 *See id.*

120 *Id.* at 1178 (quoting Gray v. Comm'r, 708 F.2d 243, 246 (6th Cir. 1983)).

121 *See id.* at 1174 (majority opinion); *id.* at 1179–80 (Ginsburg, J., dissenting).

122 *Id.* at 1179.

123 *Id.* (quoting TRW Inc. v. Andrews, 534 U.S. 19, 29 (2001)) (internal quotation marks omitted).

124 *Id.* at 1179–80.

the reasons for removal in immigration law, criminal grounds of removal, particularly aggravated felonies, are some of the most onerous for immigrants to overcome. An aggravated felon is permanently barred from admission back into the United States[125] and, significantly, an aggravated felony charge makes a noncitizen ineligible for cancellation of removal, one of the only discretionary paths to have their removal overturned.[126]

III
Recommendation for Greater Judicial Oversight

A. The Harshness of Deportation and the Case for Special Deference in Immigration Cases

The conflict between the Supreme Court and the circuit courts of appeals illustrated in *Martinez Gutierrez* appears to show a divide in their fundamental understanding of how courts should apply *Chevron* deference. This may indicate differing interpretations of how to reconcile the two competing rules of construction: *Chevron* deference and the immigration rule of lenity. It is therefore important to look at the reasoning behind the circuit courts of appeals' decisions and how their interpretation of *Chevron* might differ from the Supreme Court in order to determine the special considerations within immigration law that might warrant more rigorous judicial review.

Many cases and law review articles have highlighted the harsh nature of deportation. The Supreme Court has called deportation "a drastic measure and at times the equivalent of banishment or exile."[127] Removal, by forcing persons to leave their home and possibly their family, directly affects their lives, liberty, and property. The Supreme Court has noted that deportation may result in the loss of "all that makes life worth living."[128] While not technically a criminal penalty, the Court has noted that deportation is "intimately related to the criminal process."[129] In *Padilla v. Kentucky*, the Court pointed out that due to recent immigration changes such as the enactment of the IIRIRA, removal and criminal sanctions have become even more entwined as these "law[s] have made removal nearly an automatic result for a broad class of noncitizen offenders."[130]

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125 *See* INA § 212(a)(9)(i), 8 U.S.C. § 1182(a)(9)(i) (2012) (establishing inadmissibility based on prior removal for certain offenses).

126 *See id.* § 240A(3), 8 U.S.C. § 1229b(a) (2012) (eligibility for cancellation of removal based on no prior convictions of any aggravated felony).

127 Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948).

128 Ng Fung Ho v. White, 259 U.S. 276, 284 (1922).

129 Padilla v. Kentucky, 130 S. Ct. 1473, 1481 (2010).

130 *Id.*

B. The Implications of *Martinez Gutierrez* and *Kawashima*

Unfortunately for Martinez Gutierrez, Sawyers, and the Kawashimas, they all fell into this "broad class of noncitizen offenders" for whom removal was the only possible outcome after receiving their criminal convictions.[131] In *Martinez Gutierrez*, both respondents, who had been residing in the United States since adolescence, were brought here as minor children, had close ties to the United States, and were ultimately ordered to be removed when the Supreme Court upheld the immigration judge's original order.[132] This decision to favor a "permissible" construction of a statute seems particularly harsh for someone like Sawyers, who had been living with his family in the United States since 1995 and was convicted of a drug offense just two months shy of the seven years of residence he needed to be eligible for discretionary cancellation of removal.[133] Similarly, the case of the Kawashimas seems particularly harsh. For the Kawashimas' single criminal charge of filing a false tax return during decades of legally residing in the United States as lawful permanent residents, and after they pled guilty and served their criminal sentences, the Supreme Court still found Mr. and Mrs. Kawashima removable as aggravated felons.[134] Furthermore, despite having accrued the necessary time periods of lawful residence in the United States (unlike Martinez Gutierrez and Sawyers), Mr. and Mrs. Kawashima were prohibited from applying for cancellation of removal, one of their only discretionary remedies, due to their aggravated felony convictions.[135] In addition to the hardships of these directly affected individuals, deportation of one noncitizen often creates great hardship for family members, particularly children, residing in the United States.[136]

The truly perverse nature of these rulings becomes evident when we begin to examine these two recent cases alongside each other. In both cases, the removal proceedings were not of illegal entrants to the United States or longtime criminals but of long-term permanent residents who had legally resided in the United States for anywhere between two and twenty years.[137] In both cases, the crimes committed

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131 *See id.*

132 *See* Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2017 (2012).

133 *Id.* at 2017.

134 *See* Kawashima v. Holder, 132 S. Ct. 1166, 1171 (2012).

135 *See* INA § 240A, 8 U.S.C. § 1229b(a) (2012).

136 *See generally* David B. Thronson, *Choiceless Choices: Deportation and the Parent-Child Relationship*, 6 NEV. L.J. 1165 (2006) (discussing the distinct intersection between immigration and family law and the various ways that the two may conflict and cause serious hardships for immigrant families).

137 *See Martinez Gutierrez*, 132 S. Ct. at 2017 (involving consolidated case of one noncitizen who had two-year residency and another who had six-year residency); *Kawashima*, 132 S. Ct. at 1170 (involving a couple that had lived in the United States for approximately twenty years before pleading guilty to making false statements on their tax returns).

were singular instances and relatively minor and nonviolent in nature.[138] In both cases, the meaning of the statute used to remove these noncitizens was in question and open to multiple statutory interpretations.[139] The result of both cases was to restrict cancellation of removal: in *Martinez Gutierrez* by directly restricting who may apply for cancellation of removal and in *Kawashima* by defining a large new group of noncitizen, "aggravated felons," and making these noncitizens ineligible to apply for cancellation of removal. Taken together, *Martinez Gutierrez* and *Kawashima* put vast swathes of new lawful permanent residents at risk of being removed without any possible avenue of relief. After these recent decisions, any noncitizens who have committed a removable offense, even one that is not an aggravated felony, cannot apply for cancellation of removal unless they can individually meet the two onerous residency time requirements.[140] Additionally, many noncitizens with misdemeanor tax charges are now potentially removable as aggravated felons[141] without any chance to apply for cancellation of removal, regardless of the length of time they have been residing in this country or the burden deportation may place on them.

Many of these arguments are the same issues that created the catalyst for some form of relief from deportation and removal in 1940. Under the pre-1940 rigid statute that did not allow for any hardship waivers, deportation affected so many productive members of society with strong family and community ties to the United States that Congress eventually had to act.[142] Since the passage of the IIRIRA in 1996, however, the Supreme Court, Congress, and the BIA all seem to have largely ignored these issues.

The extreme hardships and difficulties that result from removal are the reason why judicial oversight and review are necessary in the immigration context. These hardships are not, however, the end of the argument. Rather, these hardships inform the key reasons why the Supreme Court needs to reevaluate the balance struck between *Chevron* and the rule of lenity. The true reason why immigration law requires a varied application of *Chevron* deference lies in the inherent nature of the immigration system, removal, and the

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138 *See Martinez Gutierrez*, 132 S. Ct. at 2017 (involving a drug offense); *Kawashima*, 132 S. Ct. at 1170 (involving a conviction for "aiding and assisting in the preparation of a false tax return").

139 *See Martinez Gutierrez*, 132 S. Ct. at 2017 (stating that the BIA's interpretation of the statute would "prevail[ ] if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"); *Kawashima*, 132 S. Ct. at 1174 (indicating that the Court was "interpreting Clause (i) to include tax crimes").

140 *See Martinez Gutierrez*, 132 S. Ct. at 2015.

141 *See Kawashima*, 132 S. Ct. at 1178 (Ginsburg, J., dissenting).

142 *See* GORDON, *supra* note 14, § 74.01[1].

cancellation-of-removal doctrine. I believe courts have failed to analyze meaningfully these two doctrines together because they view them as competing alternative theories. Instead, I propose a new theory and suggest that in the future, courts should not think of lenity and *Chevron* as competing doctrines but rather assume that lenity is an established principle that courts use during both *Chevron* step one and step two analyses. Essentially, the immigration rule of lenity is a doctrine to be used within *Chevron*'s framework.

C. Recommendation for Reconciling *Chevron* and the Immigration Rule of Lenity

As discussed above, the lack of meaningful judicial review in the context of cancellation of removal is particularly troubling because it is one of the only provisions allowing a deportable noncitizen to remain in the United States.[143] By its very nature, the cancellation-of-removal provision presumes that the noncitizen is removable.[144] Additionally, because a noncitizen seeking cancellation-of-removal is already removable, these individuals are in a particularly precarious position. The noncitizen in cancellation-of-removal proceedings concedes removability and relies only on the courts' good faith, discretion, and compassion to be spared the hardship of leaving this country. Furthermore, it is important to remember that cancellation of removal is at the discretion of the Attorney General.[145] Therefore, by its very nature, the statute enacted by Congress contains a purpose of leniency and forgiveness.[146] The combination of the purported goals of the immigration system, the nature of cancellation of removal as a discretionary procedure to avoid hardship, and the long-established judicial principle of lenity in deportation-related immigration cases, creates a presumption that Congress intended these procedures to favor the noncitizen over the government, and that despite *Chevron*, lenity clearly has some place in the analysis. It seems unlikely that Congress would create a limited avenue of relief from removal, make it discretionary in its application for those noncitizens who do qualify, and then intend for ambiguous statutes regarding who is eligible for review to be construed in a severely limiting way.

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143 *See* Underwood, *supra* note 8, at 888 ("For the estimated five million illegal immigrants[,] . . . cancellation of deportation is one of the few avenues available to become a lawful permanent resident.").

144 INA § 240A, 8 U.S.C. § 1229b(a) (2012) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States . . . .").

145 *See id.*

146 *See* Holder v. Martinez Gutierrez, 132 S. Ct. 2011, 2019 (2012) (stating that the purpose of cancellation of removal includes "providing relief to aliens with strong ties to the United States" and "promoting family unity" (internal quotation marks omitted)).

This presumption of congressional intent to favor the noncitizen in situations involving removal becomes even more striking when one considers a recent line of *Chevron* cases, most notably *United States v. Mead*.[147] *Mead* and similar cases have emphasized that the *Chevron* standard of deference rests on congressional intent.[148] As others have noted, *Chevron* did not argue, and it has not been claimed, that this level of deference is constitutionally required.[149] Rather, *Mead* made clear that *Chevron* deference applies because of the presumption of congressional intent that Congress has delegated its authority to make rules and carry out laws to the various administrative agencies.[150] If, however, *Chevron* deference rests on congressional intent, then a strong countervailing congressional intent may significantly undermine traditional *Chevron* deference. Given that the recent *Mead* line of cases generally considers *Chevron* to rest upon congressional intent, the myriad of evidence of an intent toward lenity, from both the traditional common law rule of lenity and from the nature of the cancellation-of-removal provision, can be used to readjust the *Chevron* analysis at both step one and step two.

First, in *Chevron* step one, a court must determine if Congress has expressed an unambiguous intent on a given issue. This raises the question, however, of how a court knows when Congress is expressing its intent clearly. Often, the plain language of the text may convey an unambiguous intent but will not in many other cases. This is exactly why courts have common methods of statutory interpretation, and *Chevron* confirms that a court should determine if Congress expressed its clear intent by "employing traditional tools of statutory construction."[151] The scope of a *Chevron* step-one analysis can therefore change depending on which tools of statutory construction the court chooses to use and how the court applies them.

First and most simply, then, courts must recognize that the immigration rule of lenity *is* a traditional tool of statutory construction, similar to the common practice of looking to legislative history to determine legislative intent.[152] While the immigration rule of lenity is treated as such in other contexts, there is no reason it cannot function as such a tool of statutory construction within *Chevron*'s framework as

147 533 U.S. 218 (2001).

148 *See, e.g.*, *id.* at 226–27 (holding that *Chevron* deference applies when it appears Congress delegated to the agency authority to make rules carrying the force of law).

149 *See* Slocum, *supra* note 54, at 535–39 (identifying arguments and cases that show that most commentators, and even the Supreme Court, do not believe *Chevron* deference is constitutionally required).

150 *Id.* at 538.

151 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984).

152 Slocum, *supra* note 54, at 541.

well. However, always applying the immigration rule of lenity as a court's first tool of statutory construction would not square with *Chevron* deference. Rather, this construction would always favor lenity whenever a court delved beyond the plain language. It is for precisely this reason that scholarship on the immigration rule of lenity suggests that lenity should only be used on "statutes found ambiguous after other traditional tools of construction have failed to identify statutory meaning."[153] Courts, therefore, are directed to look at other tools of construction before resorting to the rule of lenity. Even used as a last resort, however, lenity can remain meaningful by providing a backstop for the *Chevron* step-one analysis. In cases where a court looks beyond the plain language of the statute and examines tools of statutory construction to determine if Congress expressed an unambiguous intent, if other common tools of construction fail to illuminate fully the intent, the rule of lenity can sometimes step in to tip the scales in favor of the noncitizen as it was meant to do.

Importantly, because the rule of lenity would only be acting as a last resort in *Chevron* step one, this would not gut the *Chevron* doctrine or render it moot. In many cases, courts may still find that either the plain language or the plain language coupled with tools of statutory construction, such as examining statutory history, might express an unambiguous intent that does not favor the noncitizen. In other cases, the intent may be so unclear that neither the plain language nor any of the tools of statutory construction shed much light on Congress's intent at all. In these cases, where other tools of statutory construction fail to help disclose Congress's intent, the rule of lenity should *not* be applied, as this would default to favoring the noncitizen and eliminate *Chevron* step two. In those cases of such glaring ambiguity, courts should still rule that there was no clear intent and proceed to *Chevron* step two. The rule of lenity would then function in the space between these two extremes, where a statute's language and history seem to favor the noncitizen but perhaps not as strongly as a court would like in order to rule that the intent was unambiguous. There, the statute's language, history, and the underlying rule of lenity can come together to find an unambiguous intent to favor the noncitizen.

The case of *Holder v. Martinez Gutierrez*[154] is an excellent example of how this would work. In *Martinez Gutierrez*, Congress had implemented the original predecessor to cancellation of removal to overcome mounting hardship associated with unfair and rigid deportation

153 *Id.*
154 132 S. Ct. 2011 (2012).

proceedings.[155] Furthermore, under the previous statute and its interpretations, a parent's time as a resident was imputed to his or her children to satisfy the requirements to be eligible for discretionary cancellation of removal.[156] While the statute's language alone may not express an unambiguous intent to allow such imputation, the statute's language, the statutory history, and the underlying rule of lenity together make the case that the intention of Congress was not ambiguous and that Congress had expressed an intent to favor imputation. While this may not be a specific textual intent regarding imputation, it appears the statutory purpose creates a presumption of an intent to favor leniency for the noncitizen. By taking a deeper look at statutory construction beyond just the plain language, courts can exact more searching judicial review while remaining within the mandate of *Chevron* step one to determine if there was a "clear intent" to the statute.

In cases where a court was not inclined to find the rule of lenity probative under *Chevron* step one by either choosing to rely solely on the text without rules of statutory construction or simply finding the language too unclear even after applying principles of construction, the *Chevron* step two analysis still provides another avenue for the rule of lenity to alter *Chevron* deference. While courts often explain the *Chevron* test as if there is no further judicial review after step one, there is an additional measure of judicial review within *Chevron* step two. Step two requires that "the question for the court is whether the agency's answer is based on a permissible construction of the statute."[157] Although this requirement has often been treated in a rubber-stamp fashion, it ought not be.

Again, rather than viewing lenity as a competing theory or canon of construction, courts should properly view lenity as an underlying principle of review that informs and contributes to their *Chevron* analysis. Thus, under *Chevron* step two, one of the many factors a court would consider to determine whether an agency interpretation is "reasonable" would be how the interpretation fits (or conflicts) with the principle of lenity for removal cases. Courts "must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement."[158] While the BIA may argue their interpretation is reasonable given the exact language of the statute, the "statutory mandate" is not synonymous with the "plain language" of the statute and

155 *See id.* at 2018–19 (stating that Congress intended cancellation of removal's predecessor to further the policies of "providing relief to aliens with strong ties to the United States" and "promoting family unity" (internal quotation marks omitted)).

156 *See supra* note 88 and accompanying text.

157 Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

158 FEC v. Democratic Senatorial Campaign Comm., 454 U.S. 27, 32 (1981).

encompasses something more, including the intent of Congress. In *Martinez Gutierrez*, when the BIA construed the statute against its prior statutory history, the inherent purpose of a discretionary cancellation-of-removal statute, and the broader immigration rule of lenity, it seems plausible a court could have found that the BIA had violated the "statutory mandate" and therefore failed to meet the standard of a permissible interpretation of the immigration laws.

These recent interpretations by the BIA have significantly limited the number of noncitizens qualified to apply for cancellation of removal. Rather than allowing cancellation of removal to function as a discretionary form of relief that gives removable noncitizens the opportunity for the Attorney General to review their specific case, the BIA's limiting constructions of these statutes closes the door from the start and bars noncitizens en masse from the opportunity to have their specific case reviewed individually. The entire reason for the availability of cancellation of removal is to relieve the hardships of removal in specific cases where removal seems like an excessive penalty. The statute's only purpose is to take individuals who, while technically removable, have strong ties to the United States, and give them a statutory break.[159] Therefore, reading the cancellation-of-removal statute to take a hardline interpretation that *increases* the difficulty of its application does not seem to be a permissible reading that is in line with the statutory purpose. Furthermore, when considering the decisions in *Kawashima* and *Martinez Gutierrez* in tandem—the former vastly broadening the number of noncitizens who will be adjudged to be deportable as aggravated felons and the latter significantly restricting those deportable noncitizens eligible to apply for relief from removal—it certainly seems that there was an "unreasonable" reading of the statute, which was created solely for the purpose of providing discretionary relief. This determination of reasonableness is exactly how *Chevron* step two *should* function, and the immigration rule of lenity merely alters the reasonableness argument within this context.

Again, this use of the rule of lenity would not usurp the *Chevron* deference standard but merely use lenity within the framework of the *Chevron* analysis to alter the analysis slightly in the immigration and removal contexts. In many cases, the BIA may interpret a statute in a way that is not the *most* favorable to the noncitizen but may still fulfill the reasonable or permissible standard if it does not appear to contravene the entire purpose of the statute. Similarly, strong countervailing considerations such as administrative efficiency or practicality of implementation may tip the scale so that some less favorable inter-

159 *See Martinez Gutierrez*, 132 S. Ct. at 2019 (stating that one of the statute's objective is "providing relief to aliens with strong ties to the United States") (internal quotation marks omitted).

pretations are still clearly reasonable. In this way, the use of the rule of lenity and the underlying purpose or goal of a statute will not automatically overrule *Chevron* step two in each unfavorable case but will simply realign the reasonableness threshold under *Chevron* step two in immigration cases.

Unfortunately, while some circuit courts of appeals have been willing to overrule the BIA, they have not clearly articulated these principles of lenity and statutory intent to assist noncitizens in removal proceedings. Without meaningful arguments advanced by the lower courts or the parties involved, the Supreme Court's unwillingness to alter *Chevron* and its summary treatment of the traditional rule of lenity often stymies the attempts of the circuit courts to interpret properly the *Chevron* rule in cancellation-of-removal cases. In reviewing cancellation-of-removal cases, courts should look at the countervailing concerns to judicial deference mentioned above and recognize that the entire system of cancellation of removal is built upon a concern for lenity and alleviation of the hardships of removal. In doing so, the courts would be able to better define how the immigration rule of lenity and the *Chevron* doctrine interact as well as properly apply *Chevron* deference when strong congressional intent and statutory presumptions call for a countervailing concern to balance the *Chevron* rule. In cancellation-of-removal cases, the immigration rule of lenity must be understood as an underlying principle that informs and transforms the traditional *Chevron* step-one and step-two analyses.

Conclusion

The Supreme Court's decisions in *Holder v. Martinez Gutierrez* and *Kawashima v. Holder* are illustrative tools of a dangerous trend in recent immigration enforcement that has gone largely unnoticed and unchallenged. While much focus was given to *Arizona v. United States*, which was essentially just a preemption case, little attention has been given to the Supreme Court's other recent immigration decisions, which have greater implications for the way federal agencies and the federal courts of appeals handle removal and cancellation-of-removal decisions in our nation's immigration system. In *Martinez Gutierrez*, the Court dismissed countervailing considerations rather too quickly, preferring to defer to traditional *Chevron*-style deference. In *Kawashima v. Holder*, the Court did not expressly mention *Chevron*, but they refuse to utilize the immigration rule of lenity with little justification and ultimately uphold the more restrictive (and arguably less plausible) of two competing statutory interpretations. I believe the plights of Sawyers, Martinez Gutierrez, and the Kawashimas aptly demonstrate the very real human concerns that necessitate greater judicial review in the immigration context and an altered version of

Chevron deference. *Chevron* is not a constitutional mandate or an impassable barrier to meaningful judicial review. The Court illustrated in *Cardoza-Fonseca* that there is room for judicial review within the administrative area of immigration law. Courts, however, have been hesitant to square *Chevron* with the immigration rule of lenity. Given the enormous stakes in cases of removal, courts should consider the question more carefully in the future and attempt to articulate the principles of statutory construction, congressional intent, and lenity that should define the outer boundaries of *Chevron* within the realm of immigration law and removal proceedings.